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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CITY OF SANTA ANA,
DAVID REAM and ROBERT RICHARD,
Petitioners,
vs.
BARBARA LAMBERT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

EDWARD J. COOPER
Counsel of Record

ROBERT J. WHEELER
Assistant City Attorney

Office of the City Attorney
City of Santa Ana
20 Civic Center Plaza
Santa Ana, California 92701
(714) 647-5201

Attorneys for Petitioners
CITY OF SANTA ANA
DAVID REAM and ROBERT RICHARD

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QUESTIONS PRESENTED

1. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER LAMBERT WAS REPRIMANDED FOR THE PARTS OF HER SPEECH THAT WERE PROTECTED BY THE FIRST AMENDMENT?

2. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYEE'S SPEECH, IN ORDER TO CONSTITUTE SPEECH UPON A MATTER OF PUBLIC CONCERN MUST ADDRESS ONE OF THE FOLLOWING: 1) SPEECH MUST BE OF PUBLIC IMPORT IN EVALUATING A PUBLIC OFFICIAL; 2) SPEECH INDICATING A PUBLIC OFFICE WAS NOT DISCHARGING ITS GOVERNMENTAL DUTIES; 3) SPEECH THAT BRINGS TO LIGHT ACTUAL OR POTENTIAL WRONGDOING ON THE PART OF GOVERNMENTAL OFFICIALS?

3. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SPEECH UPON THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY CONSTITUTES INHERENT MATTERS OF PUBLIC CONCERN?

4. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FULL *CONNICK* ANALYSIS OF THE CONTENT, FORM AND CONTEXT IS NECESSARY WHEN THE SPEECH INVOLVED IS NOT UPON INHERENT MATTERS OF PUBLIC CONCERN, BUT CONCERNS ONLY THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY?

PARTIES TO THE PROCEEDING

The parties to this proceeding are Petitioners, City of Santa Ana, David Ream, City Manager, (hereinafter "Ream"), and Robert Richard, Director of the Santa Ana Public Library, (hereinafter "Richard").

The Respondents are Barbara Lambert, (hereinafter "Lambert"), and the Santa Ana City Employees Association (hereinafter, "SACEA"). Lambert is an employee in the City's library.

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PETITION FOR WRIT OF CERTIORARI

The City of Santa Ana, David Ream, and Robert Richard respectfully petition for a writ of certiorari to review the judgment of the Ninth Circuit Court of Appeals.

OPINIONS BELOW

The Ninth Circuit Court of Appeals published opinion is cited at 59 F.3d 134 (9th Cir. 1995) and is reproduced herein as Appendix A. The district court order of November 24, 1992, granting motion by plaintiffs for summary judgment and granting in part and denying in part motion by defendants for partial summary judgment is reproduced herein as Appendix B. The district court order of July 26, 1993, granting motion by plaintiff for summary judgment on defendants' claims of qualified immunity is reproduced herein as Appendix C. The judgment on special verdict of August 23, 1993, of the district court is reproduced herein as Appendix D. The pertinent constitutional provisions, the First Amendment, the Fourteenth Amendment, as well as the statute involved, 42 U.S.C. § 1983 are reproduced in Appendix E. The text of the speech by Barbara Lambert given to the City Council on October 15, 1990, is reproduced herein as Appendix F. The written reprimand by Library Director Robert Richard dated November 2, 1990, is reproduced herein is Appendix G.

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. § 1254 and United States Supreme Court Rule 10.1(a) and (c), this Court has jurisdiction to consider this petition for writ of certiorari to review the decision of the Court of Appeals for the Ninth Circuit. The Ninth Circuit entered judgment on July 10, 1995 [Appendix A].

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and the Fourteenth Amendments to the United States Constitution are reproduced herein as Appendix E-1. 42 U.S.C. § 1983 is reproduced herein as Appendix E-2.

STATEMENT OF THE CASE

This case involved the First Amendment claims of Lambert and the SACEA, as well as qualified immunity issues as to Ream and Richard. The only issue now raised before this Court is the First Amendment issue: Were the First Amendment rights of Lambert violated by the written reprimand issued by Richard?

1. Important Legal Issues

This case presents several issues in which the Court should issue a writ of certiorari.

First, there is an important legal issue of whether the Ninth Circuit was correct in holding that the *entire* speech was protected. Under *Waters v. Churchill*, __ U.S. __ (1994), 114 S.Ct. 1878, an employee who makes

an unprotected statement may be disciplined even though the nonprotected statement is surrounded by protected statements. Petitioners argue that the Ninth Circuit either did not apply *Waters* at all, or at best, incorrectly, as the majority of Lambert's statement constituted a personal attack on a public official, which is not protected speech.

Second, there is an important legal issue concerning the definition of public concern in relation to a public employee speech. The Fourth Circuit has strictly held that in order for a public employee's speech upon matters of public concern to be protected, the speech must be of public import in evaluation a public official, indicate that a public officer was not discharging its governmental duties or reveal actual or potential wrongdoing cconcerning a govertnmental officials. The Seventh Circuit has held similarly, as have other Circuits. The speech made by Lambert concerned none of these; nothing was said regarding Richard's qualifications for his post, nor was any wrongdoing alleged. The speech was nothing more than a personal diatribe against Richard.

Third, there is an important legal issue concerning speech regarding the internal workings of a governmental agency — does this speech constitute matters of inherent public concern? According to *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct. 1684 (1983), a federal court is not the appropriate place to review employment decisions made when a public employee speaks upon matters of personal interest only.

Fourth, there is an important legal issue as to whether a full *Connick* analysis as to form and context is necessary when the content of a speech is *not* upon inherent matters of public concern. The Ninth Circuit decision included no analysis of the content, form and context of plaintiff's speech and assumed because the speech

concerned a "visible" public agency, it was a matter of public concern. The Ninth Circuit cited *Connick*, but did not use it in its analysis. Cases from other circuits indicate that if an employee's speech is not upon an inherent matter, of public concern, a full *Connick* analysis is necessary to ascertain the form and context of the speech. Content of a speech that may tangentially touch on a public concern, may not actually do so, once the form and context are considered.

2. Procedural History

Lambert and the SACEA initially brought an action against Petitioners as a result of a written reprimand received from Library Director Richard as a result of reading a prepared statement before the Santa Ana City Council, which criticized Richard's management practices. When Richard, and finally Ream refused to withdraw the reprimand from plaintiff's personnel file, Lambert and the SACEA initiated the underlying action in the United States District Court for the Central District of California.

Respondents sought declaratory relief and damages for the alleged violation of Lambert's First and Fourteenth Amendment rights. The district court granted Respondents' motion for summary judgment on the issue of liability, with a finding that all named petitioners violated Lambert's First Amendment Rights. There was also a holding that respondents were also entitled to declaratory and injunctive relief, and the district court also granted respondent's motion for summary judgment denying qualified immunity to the individual Petitioners.

Petitioners appealed to the Ninth Circuit on the First Amendment and qualified immunity issues, the Ninth Circuit upheld the decision of the district court.

REASONS WHY THE WRIT SHOULD ISSUE

I.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER LAMBERT WAS REPRIMANDED FOR THE PARTS OF HER SPEECH THAT WERE PROTECTED BY THE FIRST AMENDMENT?

In Petitioner's reply brief to the Ninth Circuit, petitioner cited *Waters v. Churchill*, __ U.S. __, 128 L.Ed.2d 686, 114 S.Ct.1878, 1891 (1994), for the proposition that as long as Lambert was disciplined only for the part of her speech that was not upon a matter of public concern, there was no violation of Lambert's First Amendment rights:

> "So long as Davis and Waters discharged Churchill only for part of the speech that was either not upon an issue of public concern . . . it is irrelevant whether the rest of the speech was unbeknownst to them, both on a matter of public concern and non-disruptive. An employee who makes an unprotected statement is not immunized by discipline by the fact that this statement is surounded by protected statements."

The text of Lambert's speech to the Santa Ana City Council on October 15, 1990, is found at Appendix F. What is of extreme importance concerning the above-cited passage is that Library Director Richard reprimanded Lambert for the private nature of the speech attacked him personally; that is, for the strictly private nature of her speech.

In Richard's reprimand, he stated the following, found at Appendix G.

> "At the City Council evening session on Monday, October 15, 1990, you came and spoke before the Santa Ana City Council. Without any facts to support your remarks, you made comments to the Council such as 'our indictment of Rob Richard . . .' and 'His wrongful conduct is more insidious . . .; These statements constitute insubodinate behavior toward the Director of the Santa Ana Public Library."

Lambert argued below that her speech addressed two matters of public concern: (1) low morale of the library department due to the management methods of Richard; and (2) the City's administration had alledgedly suppressed the public disclosure of a study of ". . . library staff members' attitudes toward, and opinions of Richard." However, concerning the present discussion, if, assuming arguendo, these statements touched upon a matter of public concern, *Richard did not punish Lambert for these aspects of her speech.* Instead, she was reprimanded for the personal, nonpublic nature of her speech, in which she castigated Richard's character. *Waters* permitted Richard to do this, and the fact he actually did so, under the *Waters* holding, did not violate the First Amendment rights of Lambert.

The Ninth Circuit basically ignored *Waters* and concluded that Lambert was reprimanded for the *entire* statement before the City Council. (See footnote two of the Ninth Circuit's opinion.) This exceeded the bounds of any rational conclusion. It must be kept in mind that two-thirds of the reprimand dealt with personal criticisms of Richard and his style of management. The reprimand then concludes with the statement that "these

statements constitute insubordinate behavior toward the Director of the Santa Ana Public Library." The examples cited by Richard in his reprimand letter are personal in nature, directed toward him. If one was to assume the reprimand went beyond the remarks cited, the only conclusion that could logically be made from the text of Richard's reprimand memorandum was that he was punishing her for the personal, unprotected statements, which constituted, in his opinion, insubordination.

A. Personal attacks against a public official are not protected by the First Amendment as speech upon an issue of public concern.

Once more, assuming arguendo that: (1) low morale of the library department due to the management methods of Richard; and (2) the City's administration had alledgedly suppressed the public disclosure of a study of ". . . library staff members' attitudes toward, and opinions of Richard" *were* issues of public concern, the protection of the First Amendment does not include personal attacks made against a public official of a public institution.

In the case of *Dunn v. Carroll*, 40 F.3d 287 (8th Cir. 1994), plaintiff, an administrative assistant for a fire protection district, had been suspended for two days because he refused to remove an American flag patch from his uniform during the Gulf War. After his suspension, plaintiff attended a public board meeting, wherein the issue of his suspension was raised. After plaintiff's supervisor recited his version, plaintiff stood up and called his supervisor a liar. Plaintiff was terminated on the grounds of insubordination.

The court found plaintiff's "speech" concerning the wearing of the flag was on a matter of public concern, but his rights were not violated by his termination for insubordination. The court stated:

> "When a person does initially engage in protected . . . speech on matters of a public concern, [he] may not use this protection . . . to also level personal attacks on . . . officials . . . of a public institution" *Smith v. Cleburne County Hospital*, 870 F.2d 1375, 1383 (8th Cir.), *cert. denied*, 493 U.S. 847, 110 S.Ct. 142, 107 L.Ed.2d 100 (1989) ". . . When what started out as protected debate turns into 'caustic personal attacks' against colleagues in a public service workplace, the speech is no longer deemed relevant to 'a matter of public concern,' *id.* at 1382, and is not protected under *Connick*."

The personal drift of Lambert's expression against Rob Richard is apparent in the first few lines of her speech. Lambert's expression opens with "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP."

Lambert then commences her personal attack: In the fourth line, she states ". . . is the essence of our indictment of Rob Richard . . ." and thus sets the tone for the speech. Further on she states: ". . . the . . . dominant response to her [Chopra] inquiries was apprehension, *F E A R*!" "Richard seeks systematically to intimidate his subordinates." "I will have my retribution." ". . . they neither trust him as a person, or respect him as a manager." ". . . it is leadership by intimidation." "There is no single or overt act, no 'smoking gun' by which he might stand exposed." "His wrongful conduct is more insidious than that. Smoke is visible; the fumes with

which our atmosphere is laden are less visible than smoke, but far more toxic."

The foregoing is ample evidence that the speech for which Lambert was actually reprimanded, was not protected by the First Amendment. Even assuming arguendo she was reprimanded for *all* of the personal attacks against Richard that were contained in her speech, not just the ones specifically mentioned by Richard, Lambert's speech was still not protected by the First Amendment. Assuming even further that Lambert *was* reprimanded for her *entire* speech, and that speech did contain matters of public concern, her series of personal attacks against Richard removed any First Amendment protection her speech may have had.

II.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER AN EMPLOYEE'S SPEECH, IN ORDER TO CONSTITUTE SPEECH UPON A MATTER OF PUBLIC CONCERN MUST ADDRESS ONE OF THE FOLLOWING: 1) SPEECH MUST BE OF PUBLIC IMPORT IN EVALUATING A PUBLIC OFFICIAL; 2) SPEECH INDICATING A PUBLIC OFFICE WAS NOT DISCHARGING ITS GOVERNMENTAL DUTIES; 3) SPEECH THAT BRINGS TO LIGHT ACTUAL OR POTENTIAL WRONGDOING ON THE PART OF GOVERNMENTAL OFFICIALS?

The Ninth Circuit Court of Appeals indicated in its opinion in *Lambert v. City of Santa Ana*, 59 F.3d 134 (9th Cir. 1995), that plaintiff, Barbara Lambert, an

employee of the Santa Ana Public Library, spoke upon an issue of public concern, when she criticized the management style of defendant Library Director Robert Richard at a City Council meeting on October 15, 1990.

The panel found that: 1) the management style of Richard had become an issue of significant public concern by the time she addressed the City Council; 2) A the function of the public library was among the "most visible" of functions performed by a city government, Lambert had a constitutional right to speak to the Council regarding the issue; 3) she spoke as a union representative describing departmental problems, not private grievances.

It is the position of petitioners that the Ninth Circuit attempts to cast Lambert's speech into a matter of public concern, when Lambert's speech concerns an internal departmental matter that is not an issue of public concern. Further, Lambert's speech indicated no wrongdoing or malfeasance on behalf of Library Director Robert Richard.

To receive protection, speech must be upon a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 142, 75 L.Ed.2d 708, 103 S.Ct. 1684, 1687 (1983). And, to determine whether a matter of public concern was involved, a court must consider the content, form and context of the speech, as revealed by the whole record. *Id.* at 147-148, 103 S.Ct at 1690-1691.

Other circuits, notably the Fourth Circuit, emphasizes that for an employee to state a matter of public concern, the content of the speech must allege wrongdoing or malfeasance on the part of the government office or official. In *Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986), it is stated that for a matter to be of public concern, it must relate to wrongdoing or breach of the public trust, not ordinary matters of agency policy.

Similarly, the Seventh Circuit relies heavily on whether the content of the speech is directed toward malfesiance or wrongdoing. *Linhardt v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985); *Phares v. Gustafsson*, 856 F.2d 1003, 1008 (7th Cir. 1988); and *Colburn v. Trustees of Indiana University*, 973 F.2d 581, 586 (7th Cir. 1992)

Interestingly, the cases cited by the Ninth Circuit in its opinion also are concerned with malfeasance, wrongdoing or breach of the public trust. *Hyland v. Wonder*, 972 F.2d 1129 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 2337 (1993); *Roth v. Veteran's Administration*, 856 F.2d 1401 (9th Cir. 1988); *Allen v. Scribner*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (9th Cir. 1987); *McKinley v. City of Eloy*, 705 F.2d 1110 (9th Cir. 1983)

However, the facts of the case at bar do not disclose any of the above.

A. Lambert's speech did not serve to provide information for the public to judge Richard's qualifications

Lambert's speech does not contain any allegations of malfeseance, wrongdoing or breach of the public trust. Neither does the speech provide the public with information that "is of public import in evaluating the performance the District Attorney as a public official." *Connick* at 461 U.S. at 148, 103 S.Ct. at 1690.

Similarly, Lambert's speech does not provide a basis for the public to determine Richard's qualifications for continuing in his post.

The text of her speech (Appendix F) is entitled: "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP," a quote from management

expert Peter Drucker. She then states: "If Drucker's precept rings true . . . it is the essence of our indictment of Rob Richard, and concomitantly of our plea to the City Council." She goes on to make the following statements: "During Richard's tenure and thanks to his directorship, the spirit of the Library staff has declined dramatically." ". . . under his management, the Santa Ana Public Library still functions, but just barely." "We staffers continue to perform, to do our jobs, but devoid of zest, with leaden hearts and wooden hands."

Clearly, Lambert's speech did not provide a basis for determining Richard's qualifications for continuing in his post. Lambert would undoubtedly argue that Richard managed his employees through intimidation. However, even if his management style was rejected by his employees, Lambert's statements are entirely subjective, and are tied to Richard and his employees' dislike of him, not because of his qualifications or lack of them. Lambert says nothing about the specifics of why the library is "barely functioning"; one receives the impression that the library is "barely functioning" because of the employees' dislike of their supervisor.

Further evidence of the fact that the above speech does not provide the public with a basis for evaluating Richard's qualifications comes from the speech itself. The Library *still* functions and the staffers *continue* to perform, albeit allegedly unhappily. Observed on these terms, then, the public, as in *Connick*, is provided with no information to evaluate Richard's qualifications for continuing in his post.

B. Lambert alleged no wrongdoing by Richard

This court, *Connick v. Myers*, in analyzing the public import of Myers' speech, stated, "We do not believe

these questions are of public import in evaluating the performance of the District Attorney as an elected official. Myers did not seek to inform the public that the District Attorney's Office was not discharging its governmental responsibilities . . . [n]or did Myers seek to bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others." (*Connick* at 1691)

Connick is instructive because the questionnaire at issue dealt with office policy, and more specifically, office morale. The questionnaire included items such as fairness of transfers, existence of a rumor mill in the office, office morale, and the level of confidence of the Assistant District Attorneys in five named supervisors. None of these issues were considered by *Connick* to be a matter of public concern.

Similarly, in *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984), plaintiff's remark ("Have you heard the good news?") upon hearing that her supervisor had been terminated, did not suggest that her supervisor had committed some wrongdoing or breach of the public trust. The *Yoggerst* court stated, "we assume that many public employees-like employees in the private sector-would prefer to have another superior. It is also not unreasonable to assume that public employees will occasionally express their feelings toward a supervisor. The First Amendment, though, does not make every expression of a public employee's dissatisfaction with a superior a 'federal case'." *Connick*, at 103 S.Ct at 1690-1691.

It was clear from the content of Yoggerst's statement that she was speaking in her role as an employee about her personal feelings, and not in her role as a citizen, speaking upon a matter of public concern.

The Fourth Circuit has taken the position that matters of public concern "must relate to wrongdoing, or a

breach of trust, not ordinary matters of agency policy." *Daniels v. Quinn*, 801 F.2d 687 (4th Cir. 1986). As a result, another Fourth Circuit case, *Jurgensen v. Fairfax County*, 745 F.2d 868, 888 (4th Cir. 1984) is in accord. In *Jurgensen*, the police department employee disclosed an internal report, which identified issues of low morale, among others, to a newspaper. The court found there was no public concern issue stated by plaintiff: "It [the report] found no illegal action; no abuse of authority or power; it referred to evidence of corruption or waste; it pointed to no discrimination among employees . . ."

Of note in *Phares* the court found the plaintiff did not try to expose wrongdoing, or inform the public of problems with her university department; she merely did not like how her department was run.

In Lambert's statement, there is no attempt to attribute wrongdoing or breach of the public trust to Richard, but rather her speech launches into a personal attack on Richard.

Lambert's expression opens with "THE SPIRIT OF AN ORGANIZATION FILTERS DOWN FROM THE TOP." In the fourth line, she states ". . . is the essence of our indictment of Rob Richard . . .", and thus sets the tone for the speech. Further on she states: ". . . the . . . dominant response to her [Chopra] inquiries was apprehension, *F E A R*!" "Richard seeks systematically to intimidate his subordinates." "I will have my retribution." ". . . they neither trust him as a person, or respect him as a manager." ". . . it is leadership by intimidation." **"There is no single or overt act, no 'smoking gun' by which he might stand exposed."** (Again, the nebulousness if the entire speech is underscored — there is no concrete wrongdoing alleged.) "His wrongful conduct is more insidious than that. Smoke is visible;

the fumes with which our atmosphere is laden are less visible than smoke, but far more toxic."

Lambert mentions "wrongdoing", but alleges no facts. She presents only nebulous statements; in fact, she admits there is "no act . . . by which he might stand exposed." She further states that "during Richard's tenure, . . . the **spirit** of the Library staff has declined dramatically." Note there is nothing in Lambert's speech stating any wrongdoing, or breach of the public trust; simply a nebulous statement about the "spirit" of the library.

III.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER SPEECH UPON THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY CONSTITUTES INHERENT MATTERS OF PUBLIC CONCERN?

Speech that deals solely with the internal workings of a government agency does not constitute inherent matters of public concern.

Connick v. Myers stated that "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior" citing *Bishop v. Wood*, 426 U.S. 341 at 349-350, 96 S.Ct. 2074 at 2079-2080 (1976).

In *Jurgensen v. Fairfax County, Virginia*, 745 F.2d 868 (4th Cir. 1984), a member of the County Police

Department leaked to a newspaper an internal memorandum that concerned an internal review of a particular section of the department. The newspaper then published an article based on that report, as well as employee interviews.

The report revealed no illegal action; it identified no abuse of authority or power, no corruption or waste, nor discrimination among employees. The report *did* identify that as a result of a "4-10" schedule and understaffing, "a working environment [was created] that at times is nearly impossible from both a personal and an agency perspective." Plaintiff claimed he was demoted for leaking the internal report in derogation of his free speech rights.

Jurgensen stated:

> "If the speech relates primarily to a matter of "limited public interest", and "does not seek to bring to light actual or potential wrongdoing of breach of public trust", centering instead on matters primarily, if not exclusively "of personal interest" to the employee such as employee grievances over internal working conditions, etc., that fact must be weighed in determining whether a matter of true public concern is involved for the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs" *Jurgensen*, at p. 879, citing *Connick*, 103 S.Ct. at 1691.

Further, where personal or employee grievances are more the subject matter of the speech than matters of public interest, it is the rule that "a wide degree of deference to the employer's judgment is appropriate." *Connick*, at 103 S.Ct. 1692. This court's case, *Waters v.*

Churchill, __ U.S. __, 128 L.Ed.2d 686, 114 S.Ct. 1878, 1888 (1994), echoed a similar principle:

> "The key to government decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer . . . [W]here the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate"

Focusing on the language of the report in *Jurgensen*, the court concluded that "it seems pretty obvious" that the report did not include material of any substantial public concern; it "brought to light [no] wrongdoing or breach of trust." It dealt more accurately with what would be characterized as "internal office policy" of an agency, citing *Connick*, 103 S.Ct. at 1688, 1690-91

The internal report which Jurgensen leaked to the newspaper dealt solely with internal issues: work schedules and understaffing. These factors created a "working environment that at times was nearly impossible . . ." The court found that the working environment, even one such as *Jurgensen* was not a matter of public concern.

The internal working environment described by Lambert focused on employee attitudes of the Library Director Richard and the library staff; by contrast, *Jurgensen* concerned understaffing, which was certainly of greater import than the alleged "demoralization" of the spirit of the library Lambert describes in her speech.

Lambert argued in her brief to the Ninth Circuit Court of Appeals that her speech concerning the low morale of the library staff constituted an issue of public concern. *Jurgensen* makes clear that "low morale" is part of the

working environment, and is not an issue of public concern.

There are other cases that have held that the internal workings of a government agency do not constitute inherent matters of public concern.

In *Shands v. City of Kennett*, 993 F.2d 1337 (8th Cir. 1993) at 1343, there were three instances of speech in issue. Plaintiffs, being opposed to the hiring of a new firefighter asked a city councilmember to second a motion "tabling" the hiring. The court found that this speech was not protected by the First Amendment, as it was not upon a matter of public concern, as "they entered into the realm of interefering with government personnel decision, which is normally not a matter of public concern", citing *Connick* at 461 U.S. 147, 103 S.Ct at 1690.

Lambert, too, injected herself into a personnel decision. After Lambert indulged in her personal criticism of Richard, she ended her speech with the words: "It requires courage, immense courage, to speak out against, our library director, but we feel *immediate action* is [absolutely] necessary." (Emphasis added.) Similar to the *Shands* plaintiffs, Lambert was asking the city council to effect a personnel decision, whether it be to reprimand, replace or remove Director Richard, clearly not a matter of public concern.

The issue of whether comments about the work habits of a co-worker are protected speech was examined in *Thomasson v. Modlinski*, 876 F.Supp. 818 (E.D.Va. 1995). Plaintiff and others had observed that a co-worker was arriving late, leaving early, and did not attend to her tasks during the workday. Plaintiff and others requested defendant conduct an investigation, which did not substantiate plaintiff's claims. Plaintiff and others began to harass the co-worker, which lead to

plaintiff's suspension, and ultimately termination. He claimed his First Amendment rights were violated as a result of his speech to Modlinsky concerning his co-worker's work habits. The court found the speech to be "most accurately characterized as an employee grievance concerning internal office policy," citing *Connick* at 103 S.Ct. at 1694.

Lambert's speech was also an attempt to complain about the habits of a co-worker — that of her supervisor. As such, it did not constitute a matter of public concern.

IV.

WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER A FULL *CONNICK* ANALYSIS OF THE CONTENT, FORM AND CONTEXT IS NECESSARY WHEN THE SPEECH INVOLVED IS NOT UPON INHERENT MATTERS OF PUBLIC CONCERN, BUT CONCERNS ONLY THE INTERNAL WORKINGS OF A GOVERNMENT AGENCY?

For a speech by a government employee to be protected by the First Amendment, it must be upon a matter of public concern, *Connick*, 461 U.S. at 142, 103 S.Ct. at 1687.

A primary issue of this Petition, as before the Ninth Circuit Court of Appeals, *Lambert v. City of Santa Ana, et al.*, 59 F.3d 134 (9th Cir. 1995), was whether the speech of plaintiff Barbara Lambert was upon a matter of public concern.

Petitioners, City of Santa Ana, Library Director Rob Richard and City Manager David Ream argue vigorously

that Lambert's speech addressed an internal personnel issue, not an issue of public concern.

Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708, 103 S.Ct 1684 at 1690.

It is because all speech which is made in and about a public employment setting will have some public significance, a court must focus on these factors, which the Ninth Circuit did not do in rendering its decision in *Lambert v. City of Santa Ana, supra.*

The Courts have adopted differing approaches for determining whether employee speech is upon a matter of public concern, as noted in *O'Connor v. Steeves*, 994 F.2d 905 (1st Cir. 1993). It is the circumstances of a particular case that govern the appropriate approach under *Connick*. One approach is content-based, while the other speaks to subjective intent.

The content-based approach is applied when a public employee speaks upon a topic which is clearly an inherent matter of public concern. *O'Connor*, at 914. *Connick* and its progeny have identified these "inherent" matters of public concern: The speech or expression that relates information that is of "public import in evaluation the performance" of a public official, speech or expression indicating that a public office is not discharging its governmental responsibilities or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust on the part of governmental officials." When one of these issues is raised, the public concern dimension is obvious, and the cases provide summary analysis for the conclusion that such speech is upon a matter of public concern.

Conversely, employee speech that, based on content alone, does not qualify as a matter of inherent public concern (e.g. internal working conditions), affecting only the speaker and co-workers, may require a more complete *Connick* analysis into the form and context of the public employee expression, as revealed by the whole record. *O'Connor v. Steeves*, 994 F.2d at 914, citing *Connick*, 461 U.S. at 148, 103 S.Ct. at 1690.

Since "almost anything that occurs within an public agency could be of concern to the public, a full-fledged "form and context" analysis is approprioate in these instances." *O'Connor v. Steeves*, citing *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362.

Connick states:

> "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark — and every criticism directed at a public official — would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149, 103 S.Ct. at 1691.

In the instant case, the speech of Lambert is concerned with the internal working conditions of the Santa Ana Public Library. In her speech, Lambert states that under Director Richard's management, "the Santa Ana Public Library functions, but just barely." She then goes on to state that "we staffers continue to perform . . . but devoid of zest . . .", and vaguely alleges some sort of cover-up of the results of an "independent study of the Library staff members' attitudes toward, and opinions of Richard."

Lambert has argued, and will certainly continue to argue that these statements were made upon an issue of public concern. These allegedly "public concern"

statements indicate that the Library actually *does* continue to function, and the "cover-up" concerns not some level of wrongdoing, or an investigation that might uncover wrongdoing, but simply a survey of "Library staff members' attitudes toward, and opinions of Richard." There has been no indication the community has, in fact, manifested a legitimate concern in the internal workings of the Library that form the basis of the speech in issue.

In summary, the entire content of Lambert's speech dealt solely with internal working conditions, affecting only Lambert and her co-workers, and, a full *Connick* analysis is appropriate.

A. Assuming arguendo that the content of Lambert's speech may tangentially be upon an issue of public concern, the point of her expression indicates that, in the final conclusion, that the context and form of her speech was not upon a matter of public concern.

As previously stated, *Connick* and its progeny have identified these "inherent" matters of public concern: the speech or expression that relates information that is of "public import in evaluation the performance" of a public official; speech or expression indicating that a public office is not discharging its governmental responsibilities; or speech that "bring[s] to light actual or potential wrongdoing or breach of public trust on the part of governmental officials." *Connick*, at 103 S.Ct. 1690-1691.

In contrast, speech that does not qualify, based on content alone, as a matter of public concern requires a more complete *Connick* analysis into the form and

context of the employee speech. In the instant case, Lambert's speech was upon internal working conditions, affecting only the speaker and her co-workers.

As previously stated, public employees have a right to speak on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687. Determination of whether a matter of public concern is involved is made by analyzing the content, form and context of the employee speech, as revealed by the entire record. *Id.* at 147-148, 103 S.Ct. 1690-1691.

The cases that follow illustrate that a finding of incidental or nominal public concern content does not necessarily indicate the entire speech is protected; the form and the context must be analyzed. Prominent in this analysis of the point of the speech, and motivation of the employee making the speech.

In *Phares v. Gustafsson*, 856 F.2d 1003 (7th Cir. 1988), the court assumed that the content of plaintiff's speech, her claim that she was required to indirectly diagnose animals contrary to Illinois law, was of some interest to the public. This assumption was made not for the actual content of the speech, but as the district court granted a motion for a directed verdict, all evidence and reasonable inferences had to be considered in the light most favorable to the nonmovant plaintiff.

However, states *Phares*, 856 F.2d at 1008, *Connick* requires a court to look at the form and context of the speech at issue. *Phares*, citing *Connick* at 461 U.S. 147-148, 103 S.Ct. 1690-1691. It is within the form and context that the point of the speech is analyzed. Citing *Linhart v. Glatfelter*, 771 F.2d 1004 at 1010 (7th Cir. 1985) *Phares* continues:

> "The *Connick* test requires us to look at the point of the speech in question: was it the

> employee's point to bring wrongdoing to light? Or was it to raise other issues of public concern? Or was the point to further some purely private interest?" *Phares*, 856 F.2d 1003, 1008.

The *Phares* concluded that the form and context of her speech indicated that plaintiff's speech did not touch upon a matter of public concern. Her speech took the form of a complaint to the university's grievance procedures. The content of her expression indicated that she was not attempting to expose wrongdoing in her department at the university; she was merely dissatisfied with "certain internal decisions made by [her] immediate superiors."

In *Linhart v. Glatfelter*, 771 F.2d 1004, plaintiff, acting chief of police, who had designs on the job himself, met with one of the candidates and asked the candidate what his intentions were regarding the village manager, the defendant. This conversation, apparently instigated by the village president, who supported plaintiff in his quest for the position of chief, came to the attention of the village manager. The village manager then issued a written reprimand to plaintiff.

The court in *Linhart* found that although there might be an element of public concern regarding plaintiff's statement, the *Connick* test "does not consist in looking at what might be incidentally conveyed by the fact the employee spoke in a certain way . . . the test requires we look at the *point* of the speech in question . . ." *Linhart*, at 1010. (Emphasis in original.)

Linhart noted that if plaintiff's speech had accused the defendant of inefficiency or incompetence, or publicly criticized the administration of a city official for its conduct in office, such speech would be protected. *Id.* at 1011.

Analyzing Lambert's statement, it is clear the point of the speech was to level personal criticism of Library Director Richard, and to have him removed, reprimanded or replaced. In her discourse, she sought to register the dislike of Richard by herself and supposedly the entire Library staff; she cited examples of his behavior she found objectionable; and finally concluded with the statement that "It requires courage . . . to speak out against our library director, but we feel immediate action is [absolutely] necessary."

Finally, the issues raised by Myers of morale and discipline were of public concern, but *Connick* looked beyond that fact to the Myers' role in raising them:

> "While discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions is not to evaluate the performance of the office, but rather to gather information for another round of controversy with her supervisors." *Connick* at 461 U.S. 138 at 150, 103 S.Ct. 1691.

Similarly, the focus of Lambert' speech was a personal attack on Richard, and indicated her desire to have him removed, reprimanded or replaced. There was no attempt by Lambert to expose wrongdoing or a breach of the public trust on Richard's part.

Lambert's focus was similar to that of the plaintiffs in *Colburn v. Trustees of Indiana University*, 973 F.2d 581. There, the plaintiffs were nontenured instructors in a department plagued by departmental infighting that was threatening plaintiffs' careers. They appealed to university officials outside their department, concerned for their academic futures.

The *Colburn* court found that plaintiff's letters were attempts to seek intervention among the warring factions in the department. There was no attempt to expose malfeasance. *Colburn*, at 586.

Both Lambert and the *Colburn* plaintiffs sought interverntion in the hopes of bringing calm to perceived disorder; that was the point of both expressions, not to inform the public of wrongdoing. Both complaints dealt with localized disputes that were of import only to those involved.

B. The form and context of Lambert's speech indicated she was speaking as an employee, not as a citizen.

Connick v. Myers, 461 U.S. 138 at 147, 103 S.Ct. at 1690, described the difference between matters of public concern and matters of personal interest:

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of only personal interest . . . a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency, allegedly in reaction to the employee's behavior."

Koch v. City of Hutchinson, 847 F.2d 1436 (10th Cir. 1988) at 1445, similarly analyzed the focus of the employee speech in question, looking to the role in which the employee spoke:

> "The focus is on the role the employee has in advancing the particular expressions: that of a concerned public citizen, informing the public that a public institution is not properly discharg-

> ing its duties, or engaged in some way in misfeasance, malfeasance, or non-feasance, or, merely as an employee, concerned with only the internal policies or practices which are of relevance only to the employees of that institution?"

Lambert was not speaking as a public citizen, but rather as an employee, concerned with the internal functions of the Santa Ana public Library. As previously indicated, she stated no malfeasance, or wrongdoing on the part of Director Richard. Her complaints were only relevant to the employees of her workplace. She stated the library was functioning, but the "spirit" of the library staff "had declined dramatically." She admits there is "no single overt act . . ." "His wrongful conduct is more insidious than that", and further, "the fumes with which our atmosphere is laden is less visible than smoke, but far more toxic."

It is obvious that these remarks by Lambert are not raised as a concerned public citizen, but as an unhappy employee. As such, it is not an issue for the intervention of the federal courts.

Colburn v. Trustees of Indiana University, 973 F.2d 581 (7th Cir. 1992) involved a university department where much infighting had occured. Plaintiffs had contacted individuals in the university administration about the situation, concerned about the effect the situaion was having on their careers. *Colburn* stated that neither plaintiffs' goal was to bring the hostility to light because they felt it was of significance to the community, but to bring calm to disorder through intervention:

> "Where the overriding reason for the speech is the concerns of a few individuals whose careers may be on the line, the speech looks more like

> an internal personal dispute than an effort to make the wrongdoing public." *Colburn*, at 587.

Lambert stated in her speech that Richard would intimidate his subordinates by telling them he could "write them out of the budget" or "I will have my retribution." These statements, if true, indicate, like the plaintiffs in *Colburn*, that employees feared for their jobs.

Once again, these comments by Lambert serve to underscore the internal, private nature of the subject to which the speech is directed.

C. Context alone cannot transform a private matter into one that is an issue of public concern.

The context in which a public employee expresses himself may be relevant in the determination of whether the speech expressed a matter of public concern, however, states *Caine v. Hardy*, 943 F.2d 1406 (5th Cir. 1991), at 1415-1416, "context alone cannot transform an inherently self-interested opinion into one that implicates public issues."

Dr. Caine was a anesthesiologist who had his clinical privileges suspended for among other things, his speech opposing the plan of defendant Hardy, who was Chief of the Anesthesiology, to obtain an exclusive anesthesiology contract for himself and two partners. This would essentially freeze out plaintiff and other anesthesiologists from practicing at the hospital. Dr. Caine claimed that his speech was a matter of public concern, in that the public had a right to know whether the hospital had entered into this exclusive contract.

The *Caine* court found that although one may speculate that Dr. Caine had raised an issue of public oncern, a "similarly attenuated" argument had been rejected in *Connick v. Myers*, 461 U.S. at 148-149, 103 S.Ct. at 1690. The *Caine* court continued, paraphrasing *Connick*:

> "By such reasoning, any activity that occurs within a government office might be deemed a matter of public concern. Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane governmental operations, however with hardly even a marginal effect on the vigorous debate of public issues secured by the First Amendment." *Caine*, at 1416.

Finally, the court concluded at page 1416:

> "Had Dr. Caine proclaimed his opposition from the steps of the Mississippi capitol, the characterization of his speech would not differ. His remarks concerned solely the internal management of the hospital . . . and reflected an intra-office dispute rather than an opinion necessary for society to make an informed decision."

Lambert made her speech before the City Council, a meeting that was televised via a local cable channel. The Ninth Circuit opined that this setting assisted in the determination that Lambert's speech was a matter of public concern. However, as her speech actually concerned only an internal matter, the Library staff's discontentment with Library Director Richard, and her (their) desire for a new supervisor. As *Caine* illustrates, if a subject matter is not an issue of public concern, public dissemination will not transform it into such an issue.

CONCLUSION

Petitioners therefore respectfully urge this Court to issue a writ of certiorari on each of the questions presented herein for review.

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Respectfully submitted,

EDWARD J. COOPER
Counsel of Record

ROBERT J. WHEELER
Assistant City Attorney

Attorneys for Petitioners
CITY OF SANTA ANA,
DAVID REAM and
ROBERT RICHARD